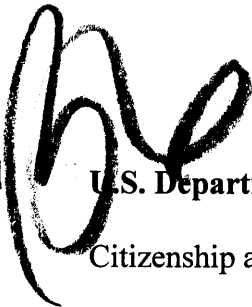


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U.S. Department of Homeland Security
Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street N.W.
Washington, D.C. 20536

File: WAC 02 025 56788 Office: CALIFORNIA SERVICE CENTER

Date: APR 21 2004

IN RE: Petitioner:
Beneficiary:

Petition: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a landscape company. It seeks to employ the beneficiary permanently in the United States as a landscaper. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The petition states that the petitioner has one employee. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submits a brief.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the processing by any office within the employment system of the Department of Labor. Here, the request for labor certification was accepted on January 14, 1998. The proffered wage as stated on the labor certification is \$10.42 per hour, which equals \$21,673.60 per year.

With the petition counsel submitted the petitioner's 2000 Form 1120S U.S. income tax return for an S corporation. That return shows that during that year the petitioner declared an ordinary income from trade or business activities of \$12,145. The corresponding Schedule L shows that at the end of that year, the petitioner had current assets of \$755 and no current liabilities, which yields net current assets of \$755.

Counsel also submitted a statement of an investment account belonging to the petitioner's owner. That statement is for July 2001, at which time the petitioner was a corporation. Because the petitioner's owner was not, at that time, obliged to pay the petitioner's debts and obligations with his own funds, information pertinent to the petitioner's income and assets at that time is not relevant to this petition.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on February 11, 2002, requested additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested evidence, in the form of either copies of annual reports, federal tax returns, or

audited financial statements, to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The Service Center also requested copies of the petitioner's California Form DE-6 quarterly wage reports for the previous four quarters and W-2 and W-3 forms showing all of the wages paid to the petitioner's employees during 2001.

In response, counsel submitted a letter, dated April 1, 2002, in which she explained that the owner of the company is, at present, the sole employee. The owner's pay is deemed a shareholder draw and the petitioner had, at the time of that writing, no employees. As such, the petitioner provided no Form DE-6 quarterly wage reports, no W-3 form, and no W-2 forms. Counsel submitted a letter, dated February 24, 2002, from the petitioner's accountant attesting to the arrangement counsel described.

In addition, counsel submitted the petitioner's owner's 1998, 1999 and 2000 Form 1040 U.S. individual income tax returns. Counsel noted that the petitioner's 2000 Form 1120S U.S. income tax return for an S corporation had previously been submitted and stated that the petitioner had not yet generated its 2001 tax return.

Although the petitioner had previously submitted a 2000 Form 1120S tax return showing that the petitioner is an S corporation, a schedule C attached to the petitioner's 2000 Form 1040 individual tax return indicates that the petitioner was a sole proprietorship during that same year. The Form 1120S, however, states that the petitioner incorporated on March 25, 2000. That the petitioner incorporated during 2000 explains the apparent discrepancy.

The 1998 schedule C shows that the petitioner earned a net profit of \$38,322 during that year. The Form 1040 tax return shows that the petitioner's owner's adjusted gross income, including the profit from the petitioner, was \$58,041 during that year.

The 1999 schedule C shows that the petitioner earned a net profit of \$38,541 during that year. The Form 1040 tax return shows that the petitioner's owner's adjusted gross income, including the profit from the petitioner, was \$50,973 during that year.

The 2000 schedule C shows that the petitioner earned a net profit of \$1,865 from January 1, 2000 to March 24, 2000. The Form 1040 tax return shows that the petitioner's owner's adjusted gross income during that year was \$28,206. That amount includes \$1,865 in net profit from the period when the petitioner was a sole proprietorship and the \$12,145 ordinary income from the period after the petitioner incorporated.

The petitioner, however, became a corporation on March 25, 2000. During the period when the petitioner was a corporation, the petitioner's owner was not obliged to use his income and assets to pay the proffered wage. Therefore, the calculation of the petitioner's ability to pay the proffered wage during 2000 must have two prongs. The petitioner must demonstrate the ability to pay the proffered wage prior to incorporation, which calculation may include the petitioner's owner's income and assets, as well as the petitioner's net profit. The petitioner must also demonstrate the ability to pay the proffered wage after incorporation, which calculation shall not include the petitioner's owner's personal income and assets. This compound calculation is further detailed below.

In his decision, the Director, California Service Center, considered the petitioner's household

maintenance costs against its net income. The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on May 13, 2002, denied the petition.

On appeal, counsel asserts that the director incorrectly computed the funds available to pay the proffered wage.

As was stated above, the income and assets of the petitioner's owner may be considered in determining the petitioner's ability to pay the proffered wage during the period when the petitioner was a sole proprietorship, but not during the period when the petitioner was a corporation. A basic tenet of corporate law is that a corporation's funds are distinct from those of its owner or owners.

A corporation is a legal entity separate and distinct from its owners or stockholders. The debts and obligations of the corporation are not the debts and obligations of the owners or stockholders. As the owners or stockholders are not obliged to pay those debts, the assets of the owners or stockholders cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958), *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&M Dec. 631 (Act. Assoc. Comm. 1980).

The personal income and assets of the petitioner's owner prior to the petitioner's incorporation, then, may be considered in the determination of the petitioner's ability to pay the proffered wage, but only the ability to pay the wages due prior to the petitioner's incorporation. After incorporation, the petitioner is obliged to show the ability to pay the proffered wage out of the petitioner's income and assets, without recourse to the owner's funds.

Counsel submitted a statement pertinent to the petitioner's owner's investment account during July 2001. The petitioner, however, incorporated during March of 2000. The record contains no evidence of the value of the petitioner's owner's liquid investments during the period when the petitioner was a sole proprietorship. This office shall make no assumption pertinent to that amount. No portion of the value of the petitioner's owner's investment account subsequent to the petitioner's incorporation shall be included in the calculation of the petitioner's ability to pay the proffered wage during any of the salient years.

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns in assessing a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the INS, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. at 537. See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

The proffered wage is \$21,673.60 annually. During 1998, the petitioner's owner's adjusted gross income

was \$58,041. Had the petitioner's owner been obliged to pay the proffered wage out of that amount, over \$36,000 would have remained. The director did not request information pertinent to the petitioner's owner's personal budget, and no such information appears in the file. In the absence of any such request or information, this office finds that the petitioner demonstrated its ability to pay the proffered wage during 1998.

During 1999, the petitioner's owner's adjusted gross income was \$50,973. Had the petitioner's owner been obliged to pay the proffered wage out of that amount, over \$29,000 would have remained. Again, in the absence of any request for, or information pertinent to, the petitioner's owner's personal budget, this office finds that the petitioner demonstrated its ability to pay the proffered wage during 1998.

From January 1, 2000 to March 24, 2000, the petitioner was a sole proprietorship. The pro-rata share of the annual amount of the proffered wage for that period is \$4,987.90, the amount of the proffered wage times 84/365. The petitioner must show the ability to pay that amount during that period using the petitioner's own net profit and the petitioner's owner's income attributable to that period.

Clearly, all of the petitioner's \$1,865 net profit was derived prior to incorporation. Equally clearly, the petitioner's \$12,145 in ordinary income was not. The remainder of the petitioner's adjusted gross income, that portion which was derived from dividends, interest, etc., shall be prorated as the proffered wage was. Those remaining items of the petitioner's income equal \$14,328. The prorated portion of that amount which is attributable to the period prior to incorporation is \$3,297.40. When that amount is added to the petitioner's net profit of \$1,865, the sum, \$5,162.40, is the amount that was available to support the petitioner and pay the proffered wage. The amount available, \$5,162.40, was insufficient to both pay the prorated portion of the proffered wage, \$4,987.90, and support the petitioner's owner during that same period. To expect the petitioner to live on \$174.50 per year is manifestly unreasonable.*

The petitioner is also obliged to show the ability to pay the proffered wage during the period from March 25, 2000 through December 31, 2000. During that period, the petitioner was a corporation, and must show the ability to pay the proffered wage out of its own income and assets, without regard to the income and assets of its owner. The prorated portion of the proffered wage attributable to that period is \$16,685.70.

The petitioner declared ordinary income \$12,145 during that period and ended the year with net current assets of \$755. Neither amount is sufficient to pay the \$16,685.70 prorated portion of the proffered wage from March 25, 2000 to December 31, 2000.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during 2000, both before and after its incorporation. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

* In *Ubeda v. Palmer*, *Supra.*, the court concluded that it was highly unlikely that a petitioner could support himself, his spouse, and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or about 30% of the petitioner's gross income.